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No. 90-1462

In The

Supreme Court of the United States

October Term, 1990

J. A. JONES CONSTRUCTION CO. and E. R. MITCHELL CONSTRUCTION CO., d/b/a JONES/MITCHELL, a JOINT VENTURE,

Petitioner,

vs.

CITY OF ATLANTA, GEORGIA,

Respondent.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Georgia Supreme Court correctly ruled that damages awarded under 42 U.S.C. § 1983 duplicated the damages which were recovered by petitioner under state law and thus constituted a "double recovery" for a single injury.

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF GEORGIA

All of the parties to the proceeding in the Supreme Court of Georgia are correctly listed in the caption of the case in this Court.

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is set forth in *City of Atlanta v. J. A. Jones Construction Co.*, 195 Ga. App. 72, 392 S.E.2d 564 (1990). The opinion and decision of the Supreme Court of Georgia set forth at *City of Atlanta vs. J. A. Jones Construction Co.*, 260 Ga. 658, ___ S.E.2d ___ (1990).

Copies of these decisions correctly appear in the appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Georgia was rendered on December 5, 1990. That Court denied rehearing on December 19, 1990. The Petition for a Writ of Certiorari was filed with this Court on March 19, 1991. This Court has certiorari jurisdiction, if it chooses to exercise such jurisdiction, under 28 U.S.C. § 1257(3) in that this controversy involves the interpretation and application of a statute of the United States.

FEDERAL STATUTE INVOKED

Every person who under color of any statute, ordinance, regulation, custom or usage of any state . . . subjects or causes to be subjected any citizen of the United States to the deprivation of any rights, privileges or immunities secured by the constitution and laws shall be liable to the party injured in an action at law. . . . 42 U.S.C. § 1983.

STATEMENT OF THE CASE

In the early part of 1985, the City of Atlanta, Georgia, respondent herein (hereinafter the "City") determined that it needed to expand its parking facilities at its airport, and in furtherance of that effort, the City's Director of the Bureau of Purchasing and Real Estate issued an invitation to bid on a contract for the construction of two parking decks at the airport. The invitation to bid stated that the bids were to be submitted by 2:00 P.M. eastern

standard time on April 10, 1985. J. A. Jones Construction Co. and E. R. Mitchell Construction Co., d/b/a Jones/ Mitchell, a Joint Venture, the petitioner herein (hereinafter "Jones" or "petitioner"), submitted a bid on this contract. Several other construction companies, including Interstate Construction Company ("Interstate") also submitted bids. The Interstate bid was the lowest bid received. Jones' bid was the second lowest.

The City's Bureau of Purchasing and Real Estate uses an electric wall clock attached to a printing mechanism to record the time at which bids are submitted. Jones' bid was recorded by the city clock as being received at 1:59 P.M. on April 10, 1985. The Interstate bid was recorded by the city clock as being submitted at 2:03 P.M. on April 10, 1985.

Having submitted a bid marked untimely by the City, Interstate began efforts to secure the contract. At 5:00 P.M. on the same day, at Interstate's request, the City checked its bid clock and it was three minutes faster than the clocks at the U. S. Bureau of Standards as well as a local time service. By those clocks, the Interstate bid would have been timely. Letters and telephone calls from attorneys for both Interstate and Jones ensued.

The bid was awarded to Interstate, the low bidder. Jones filed its Complaint against the City and three of its officials on July 19, 1986 seeking damages in the form of profits which it would have made but claimed it lost because of the failure of the City to award it the contract. The complaint contained two alternative counts: a claim brought pursuant to state law and a count brought pursuant to 42 U.S.C. § 1983. The Georgia Supreme Court

held that the damages recoverable under each of these counts were identical and held that the damages awarded by the jury under the state law count fully compensated the plaintiff, so that the damages awarded under the federal count were unnecessary:

> "The basis for appellees' § 1983 claim was that appellant failed to afford them a hearing at which they could contest the award of the contract to another bidder. The damage from that failure was that appellees were not themselves awarded the contract. As we have held above the permissible recovery for that wrong is the reasonable expense of bid preparation. Accordingly, we hold that the award for damages on the § 1983 claim must also be reversed." 260 Ga. at 659.

At page four of its brief, petitioner Jones claims that the trial court "avoided duplication" of damages by "charging explicitly that the jury must not award the same damages on both counts". This statement is erroneous.

In its initial charge, the trial court made no effort whatsoever to make *any* distinction between Count One and Count Two concerning the damages to be awarded. (T-357-359). Instead, the trial court specifically instructed the jury to consider *the same* elements in both counts (T-357-359). Note the charge of the court at page 357 of the transcript of this trial:

> "Members of the jury, I charge you that as a matter of law the plaintiff is not entitled to recover as damages its fees for the alternate bids, that is, the fee in the amount of $250,000 identified as Alternate No. 1 in the documentary evidence and the fee in the amount of $264,365

> identified as Alternate No. 2 in the documentary evidence.
>
> You may, however, award the plaintiff its fee on the base bid if you deem that appropriate under the facts as you find them from the evidence in the law as I instruct you. *And you may apply this charge that I have given you to both counts* of the indictment." (sic) (T-357) (Emphasis supplied)

Then compounding its error, the trial court restated its erroneous charge in different words:

> "I charge you further members of the jury that you may award plaintiff its lost profits if you find that the calculation of lost profits is reasonably ascertainable. *You may consider this charge in regard to both counts.*" (T-357-358) (Emphasis supplied)

In light of the foregoing quote, it is impossible to conclude that the court "charged explicitly" that the jury "must not award the same damages on both counts". (Petition, page four)

These charges were clearly erroneous and clearly confused the jury. Indeed, the jury displayed its confusion by sending a note to the judge (T-369) asking the following question:

> "If a money award is granted, what determines whether it goes to Count One or Count Two?" (T-369)

It was only after the jury showed that it was confused, and after the City had noted its objections for the record, that the court attempted after the fact to partially unscramble the egg, thus falling into another error by attempting to instruct the jury to award damages to the plaintiff's federal claim based on the abstract value of the

right being claimed. (T-372-374) This instruction violated this Court's holding in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1966).

Jones seeks to glean separate support for the award under its federal claim by referring to "lost profits from so-called 'add-ons' (additional work undertaken in the normal course by the awardee of the original contract)". (Petition, pages 4-5). These add-ons do not provide record evidence to support the duplicative damages awarded on Jones' federal claim, *because the trial court directed a verdict* as to such "add-on fees" in favor of the City and specifically instructed the jury not to award them. (T-357).

Jones urges record support for the federal damage claim in a series of "layoffs" of its employees. But petitioner cites no evidence and cannot cite any evidence as to how many layoffs occurred, when they happened, when the employees were rehired, or any other concrete or tangible way in which the petitioner was damaged in a legal sense by these layoffs. (Petitioner is, after all, a corporate entity separate and apart from its employees and required to prove its own damages in court). Petitioner only suggests in a vague way that it was "less prepared to bid for work on subsequent contracts". This is much too speculative for the Court to consider as a basis for awarding damages.

SUMMARY OF ARGUMENT

The underlying property interest protected by petitioner's due process claim is identical to the property

interest protected by state law and the damages awarded under both the federal claim and the state law claim were correctly held by the Georgia Supreme Court to be duplicative so that full recovery under petitioner's state law count precluded an award of the same damages under petitioner's federal count.

ARGUMENT AND CITATION OF AUTHORITIES

Petitioner argues that the measure of damages ruling by the Georgia Supreme Court conflicts with federal law, but does not point out how such a conflict exists. In this regard, petitioner's argument assumes there is a difference between the federal rule and the state rule regarding the measure of damages in a case such as this. But the state law count was the one where bid preparation costs, contract fees and lost profits were recovered in the first instance. The trial court instructed the jury to bring in a separate award for violation of the federal constitutional right based on the jury's "enlightened conscience" considering "all of the evidence in the case." (T-372-373)

It is important to remember that Jones' constitutional claim is one of procedural due process: the constitutional right asserted is not an insurmountable bar to the deprivation of life, liberty or property; it is only a procedural right that one may not be deprived of life, liberty or, in this instance, property without "due process of law". Therefore, the Court must look to the underlying property interest protected by the constitutional right being asserted; as stated by this Court in *Carey v. Piphus*, 457 U.S. 247, 98 S.Ct. 1042 (1978):

> "In order to further the purpose of §1983 the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interest protected by the particular right in question – just as the common law rules of damages themselves were defined by the interests protected in the various branches of the tort law."

The petitioner seeks to avoid the difficulty with the holding of the Court of Appeals, and the reason for the reversal thereof by the Georgia Supreme Court, which is defining the damages (other than the lost fees and the bid preparation costs which had been awarded under Count One) which the petitioner suffered to justify a separate award under Count Two. There are none.

The petitioner has attempted to draw a distinction between the failure of the City to award the contract to it, and the City's failure to convene a hearing (i.e., its due process claim) in which petitioner could protest the failure to award the contract to it. Of course, the only possible purpose of such a hearing would have been for the petitioner to have tried to persuade the city officials to award it the contract.

In other words, the underlying property interest under both the state and federal law counts in this case is the same one: the failure of the petitioner to obtain a contract which it desired.

Thus, petitioner's argument that two separate injuries are at work here ultimately lead down one single path of error. No matter which event petitioner complains of, the end result, i.e., the injury to petitioner, was only one: it bid on a contract which it did not get. The Georgia

Supreme Court correctly held that the award of damages under both counts would have been a "double recovery" for a single injury. Put another way, if it had been awarded the contract what would the damages have been to the petitioner caused by a failure to have had a hearing?

Alternatively, the Georgia Supreme Court avoided the permitting of a recovery of $375,000 for the abstract value of the constitutional right denied by the failure to convene a hearing, recognizing that this kind of recovery has been expressly forbidden by this very Court under its holding in *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537 (1986).

The Court of Appeals of Georgia simply declared that there were two injuries in this case without specifying what they were and how they differed. The Supreme Court of Georgia corrected this error, recognizing, as this court did in *Carey v. Piphus*, 437 U.S. 247, 98 S.Ct. 1042 (1978) that "rights, constitutional and otherwise, do not exist in a vacuum" and that "their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect". The Georgia Supreme Court also recognized the holding in *Carey v. Piphus* that "the cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty". Here, the petitioner has been fully compensated under Georgia law for the injury caused by the alleged breach of duty. It need recover no more under its federal law count and this court does not need to grant certiorari for that reason.

As noted in *Carey v. Piphus*, 437 U.S. 247, 98 S.Ct. 1042 (1978) "the members of Congress that enacted Section 1983 did not directly address the question of damages . . . " and there is "no evidence . . . that Congress intended any enforcement mechanism more formidable . . . than compensatory damages". *Carey v. Piphus*, 437 U.S. 252, 98 S.Ct. 1048 (1978).

As noted in *Carey v. Piphus*, "in some cases the interests by a particular branch of the (common law of torts) may parallel closely the interests protected by a particular constitutional right", and "in such cases it may be appropriate to apply the tort rules of damages directly to the section 1983 action."

Here, as discussed above, the interest protected by the state law is *identical* to the interest protected by the due process constitutional right asserted by Jones – it bid on a contract which it did not get.

Where interests protected by a particular constitutional right are protected by a parallel state law, the appropriate measure of damages may well be, and in this case was, the amount of damages awarded under the state law theory of recovery.

"The rules governing compensation for injuries . . . should be tailored to the interests protected by the particular right in question . . . " *Carey v. Piphus*, 435 U.S. 247, 253, 98 S.Ct. 1042, 1050 (1978).

In *Garcia v. Wilson*, 731 F.2d 640 (1984), it was held that the language in 42 U.S.C. §1988 requires a "three step process": first, the court should look to the laws of the United States so far as suitable to carry the (civil rights

statutes) into effect; next, if no suitable federal rule exists, courts undertake the second step and apply "state common law as modified and changed by the constitution and statutes" of the forum state; and finally, the state law is to be applied if it is not "inconsistent with the constitution and laws of the United States". *Garcia v. Wilson*, 731 F.2d 640, 646 (1984).

Undertaking this three step process, one finds first that there are no cases setting forth a federal standard for calculating damages in a case such as this, where a "disappointed bidder" who has not been awarded a contract and claims damages therefor, has sued the public entity letting the contract. Since no federal rule exists, the court should look to the state law and the law in Georgia has been set forth in this very case: the disappointed bidder is entitled to recover the reasonable costs of preparing its bid, but not entitled to recover lost profits. Applying the third step, there is no reason to conclude that this state law found to exist in Georgia is "inconsistent with the constitution and laws of the United States". Therefore, the Georgia Supreme Court correctly applied the state law in this case and held the federal damages would have been duplicative.

This is consistent with the numerous holdings that "when state law claims have been joined with federal civil rights actions", the Supreme Court "had traditionally looked to principles of common law in fashioning suitable remedies". *Carey v. Piphus*, 435 U.S. at 258, 98 S.Ct. 1049 (1978). See, also *Clappier v. Flynn*, 605 F.2d 519 (10th Cir. 1979) where it was held:

> "As such, the two claims for relief pled in this case are simply alternative bases for seeking the

> same relief, in much the same way as negligence, breach of express and implied warranties, and strict liability are alternative theories for according a damaged plaintiff in a products liability action identical relief. It is clear . . . that a plaintiff is not entitled to a separate compensatory damage award under each legal theory. Rather, he is entitled to only one compensatory damage award should liability be found on any one of the three or more than the three theories involved." *Clappier v. Flynn*, 605 F.2d 519, 529 (1979)

Except in cases where punitive damages may be allowed (which is not the case here), an injured party may recover damages only for the *actual loss* he suffered and no more. He is to be made whole, but not entitled to be put in a better condition than he would be in had the wrong not been committed. *Missouri Pacific Railroad Co. v. H. Rouw Company*, 258 F.2d 445 (5th Cir. 1950) *cert. denied*, 358 U.S. 929, 79 S.Ct. 315; *Clappier v. Flynn*, 605 F.2d 519, 529 (10th Cir. 1979).

CONCLUSION

For the foregoing reasons, and under the authorities cited above, the ruling of the Supreme Court of Georgia was correct and this Court should deny petitioner's request for a writ of certiorari.

This 19th day of April, 1991.

Respectfully submitted,

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